No. 15,143

IN THE

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

OLAA SUGAR COMPANY, LIMITED,

and

ILWU LOCAL 142,
Respondents.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

ANSWERING BRIEF FOR RESPONDENT OLAA SUGAR COMPANY, LIMITED

ARTHUR G. SMITH
Bishop Trust Building, Honolulu, Hawaii,

Attorney for Respondent
Olaa Sugar Company, Limited

SMITH, WILD, BEEBE & CADES
Bishop Trust Building, Honolulu, Hawaii

Of Counsel.

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STATUTES

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PRELIMINARY STATEMENT

The petition of the National Labor Relations Board, hereinafter generally called the "Board", for enforcement of its order issued against respondents, involves two points: (1) The alleged discriminatory discharge by Olaa Sugar Company, Limited, on or about December 17, 1953, of Favorito P. Banez, a truck driver; and (2) the question as to the Board's jurisdiction in issuing its order.

In this brief Olaa Sugar Company, Limited, will not discuss the Board's decision that Banez was discriminatorily discharged. On that point Olaa relies upon the brief of the respondent, ILWU, Local 142.

The situation presented by the Board's decision that it has jurisdiction in this case is of great importance to the entire Sugar Industry in Hawaii, especially in view of the purported facts upon which the Board bases its decision and order, and of the Board's conclusions of law in connection with the facts in the case, and in this brief Olaa will discuss the question of the Board's jurisdiction.

The Board, acknowledging that its jurisdiction depends upon whether Banez, at the time of his discharge, was an agricultural laborer within the meaning of Sec. 3(f) of the Fair Labor Standards Act, ruled that he was an industrial employee connected with the mill operations of Olaa. Olaa contends that the evidence shows that Banez was an agricultural laborer.

I

STATEMENT OF FACTS

Olaa does not agree with certain portions of the statement of facts in the brief for the Board. Much less does it agree with some of the Board's findings of fact, some of which will be specifically discussed hereinafter. Inasmuch as the discussion of some of the Board's findings of fact is necessarily of some length and involves a consideration of the evidence, these are not included in Olaa's statement of facts.

On or about December 19, 1953, Favorito P. Banez, who was employed by Olaa as a senior truck driver, was discharged by Olaa, and under date of July 13, 1954, the Labor Board filed a consolidated complaint against Olaa and ILWU 142 (R. 5-10), charging that Banez was discriminatorily discharged.

During 1953 and at the time Banez was discharged Olaa was engaged in the business of growing, cultivating, harvesting and processing into raw sugar and molasses in its sugar mill sugar cane grown by it on its own lands, and also in processing in its mill, on either a cane-purchase or a toll agreement, cane grown by independent growers on lands owned or controlled by them. Olaa, by its employees, harvested the growers' cane at the growers' expense, and its employees, including Banez, hauled the cane to its mill. Olaa owned and cultivated approximately 7418 acres of its own cane, and the land under cultivation by the independent and adherent planters (hereinafter generally called "growers") amounted approximately to 6911 acres (R. 132), of which total approximately 2500 acres were leased by Olaa to the growers (R. 147).

Olaa had approximately 340 miles of its own roads, and in addition there were about 106 miles of private roads through the fields of the growers over which Olaa had the right to travel. All of the cane of both Olaa and the growers was loaded onto Olaa's trucks on these private roads. None was loaded on a public highway (R. 136-138). Olaa had three distinct operating departments—a field department, a milling department, and a third, consisting of assorted services (R. 139).

The field department included the harvesting department (R. 139). The transportation section of Olaa's operations was under the harvesting superintendent, George Mair (R. 153), who was in charge of all the truck drivers and their operations (R. 155, 160). The truck dispatcher, the immediate supervisor of the truck drivers, was under the supervision of the harvesting superintendent (R. 155, 160, 169).

The plantation fields are divided into three sections (R. 155)—the Mountain View Section, the Olaa Section, and the Puna Section. The Olaa and Mountain View Sections are adjoining. The Puna Section consists of seven noncontiguous areas called respectively the Pahoa, Kamaili, Kaueleau, Kauaea, Malama, Pohoiki and Kapoho areas (Empl. Exh. 2A). This exhibit, a map, is not in the record filed with this Court. Counsel for the Board states that it will be handed to the Court at the oral argument (Br. 3). It is necessary for an understanding of the facts.

The exhibit shows the public roads and the plantation railroad system. The railroad system is shown by hatched lines. The railroad operations were discontinued several years ago. The exhibit does not show any private roads. A large portion of the railroad bed was in 1953 used as a road over which the cane trucks passed to and from the mill (R. 131, 138, 163-164). The public roads go through large areas of Olaa's cane lands (R. 153).

Because of the nature of the land, due to lava flows, Olaa's cane lands in the Puna Section are separated by large areas of waste—uncultivatable land—and while

the cane areas are as contiguous as possible (R. 132), the result is that the distance of the longest haul from the fields in the Puna Section to the mill is long—about 23 miles from the farthest fields to the mill. The longest haul in the Olaa-Mountain View area is around 14 miles (R. 140-141).

The mill is located in the Olaa Section and is surrounded by Olaa's cane fields (R. 140). The mill proper is one building (R. 141). The entire mill operations were under the control of the factory superintendent (R. 139). The mill had approximately 170 employees who were employed "strictly in the factory or milling operations and the service operations associated with the running of the mill" (R. 142). These include a timekeeper in the mill (R. 142). All these were maintenance employees (R. 142).

The dispatch control shack of the truck dispatcher is situated not in the mill, but in the mill yard (R. 166).

The method of harvesting and loading the cane onto the trucks is in general as described in the brief of the Board, except for the duties of the truck drivers. The cane cutters gather the cane into piles weighing about 1¼ tons, in slings. Each pile or bundle is then dragged to the side of the private road and loaded onto the trucks which carry from 16 to 18 of these piles in one load (R. 157). It does not appear that these trucks get a full load at one spot. The trucks travel along the road accompanying the traveling loading crane (R. 157).

II

THE REPORT OF THE EXAMINER AND THE DECISION OF THE LABOR BOARD

The Board stated that it had considered the entire record in the case, and had adopted the Trial Examiner's findings of fact and conclusions of law, with two exceptions which the Board on its own initiative supplied (R. 78).

The following is a digest of the findings and conclusions of the Examiner and of the decision of the Board.

A. Report of the Examiner

The Examiner stated:

1. That Mair (the harvesting superintendent) had testified that the "central point of all trucking operations was at the mill, from which the trucks were dispatched and their operations controlled by the dispatcher who directed their operations by means of a radio phone" (R. 32);

2. That on an annual basis the truck drivers spent approximately 50 to 60 percent of their time on the public highways, and 40 to 50 percent on Company roads; that all loading and unloading of the trucks was done exclusively on the Company's property, and none on the public highway (R. 33);

3. That during loading and unloading the truck drivers had no duties except to stay with their trucks, move them as required, and chop off any cane sticks protruding from the vehicles (R. 33);

4. That during one month of each year the truck drivers worked on trucks at the Company's garage (R. 34);

5. That the same force of truck drivers hauled both Olaa's cane and the growers' cane from fields to mill, and spent *about* half their time hauling cane from the Company's fields, and half their time hauling cane from the independent growers' fields;

6. That the job description for the truck drivers was originally prepared by the control dispatcher, checked with the industrial relations department, and then by Mair as the head of the department (R. 34);

7. That a condition precedent to the position of truck driver was the possession of a County of Hawaii vehicle operator's license (R. 35);

8. That an "examination of the *maps* discloses that the public highway system is the primary means of transportation between the various sections of the Company's lands and the sugar mill, and are the only hard surface roads in the entire area" (R. 29-30); and that although the total length of the private roads to the fields was substantial, Mair testified that the usual manner of operation was to route the vehicles of the public highways, then into the fields over the private roads, and then to bring the trucks out by the shortest route to the public roads and thence to the mill; that considering the fact that loading and unloading occurred on Company property, and that such time was included in time spent on Company property "although the driver merely awaited completion of the operation,

it would appear that most of Banez's duties as a driver were performed on the public highway" (R. 53);

9. That the ratio prevailing between the area of Olaa's cane lands and those of the independent growers would be reflected in the work of the drivers, and that, "On that basis, they spend very nearly as much time hauling independent grower-raised cane as they do hauling company-raised cane" (R. 53);

10. That in view of all the foregoing, plus the fact that the truck drivers were required to have a County of Hawaii driver's license, "it would seem clear that Banez could not be considered an agricultural worker" (R. 53);

11. That in the series of cases the First Circuit Court of Appeals had held that the agricultural exemption would not apply to the *milling* operations of the company which milled the cane of independent growers and its own (citing *Bowie v. Gonzalez*, 117 F. 2d 11), and that the same Court later had specifically held that "the transportation of sugar cane is incident to milling rather than to farming, and therefore is not exempt under the Act" (citing *Calaf v. Gonzalez*, 127 F. 2d 934, and *Vives v. Serralles*, 145 F. 2d 552);

12. That since the Board had followed the rationale similar to that of the *Calaf* case in applying the Labor Act to the Sugar Industry, he felt obliged to follow that authority;

13. The Examiner did not have the Supreme Court decision in the case of *Maneja v. Waialua Agric. Co.*, 349 U.S. 254, but referring to the decisions of the Ninth Circuit Court of Appeals in that case he stated

that he was not persuaded that decisions of the courts interpreting the Fair Labor Standards Act could be accepted as limiting the interpretation and application of the National Labor Relations Act (R. 54-55).

B. Decision of the National Labor Relations Board

It is interesting to note that the brief for the Board contains in the appendix certain correspondence dated June 28, 1955, July 13, 1955, and July 19, 1955, between William R. Consedine, Acting Solicitor, United States Department of Labor, and Stewart Rothman, Solicitor of Labor (Br. 39-44). This correspondence was not a part of the evidence in the instant case. The Board's decision is dated October 20, 1955. The Board's discussion of the Supreme Court's decision in *Maneja v. Waialua Agricultural Co., Ltd., supra*, seems to follow rather closely Solicitor Rothman's analysis thereof (R. 81-82).

The Board found that:

1. The *Clinton Foods* case, 108 NLRB 85, is not applicable to Olaa's truck drivers, but that, on the contrary, the general work of Olaa's drivers was more like that of the semi-drivers in the *Clinton Foods* case and not like that of the flat drivers, and was, therefore, industrial in character (R. 79-80);

(Acting Chairman Rodgers dissented on the ground that the Supreme Court's decision in the *Waialua* case required the Board to find that Banez was an agricultural laborer; that the fact that a part of the cane transportation was over public roads, and that the truck drivers did not haul laborers and equipment to

the fields, was not sufficient to differentiate Olaa's drivers from Waialua's railroad workers, and that the *Clinton Foods* case "which is now established Board doctrine" was controlling (R. 93-95) ;)

2. That the length of the haul in the Olaa case makes the *Clinton Foods* case inapplicable;

3. That while the truck drivers spent about 38 percent of their time at the roadside during the loading of the trucks, they "normally just stand around while others do the loading, and do nothing more after the truck is loaded than to slash off the ends of cane sticks which might be protruding from the truck..." and that therefore the truck drivers, unlike the "goat-flat drivers" in the *Clinton Foods* case, performed no actual work on the farm itself "so as to be even engaged in an agricultural function," and that therefore the "part time" rule of the *Clinton Foods* case, upon which Acting Chairman Rodgers relied (R. 93-95), is not applicable to the instant case (R. 80) ;

4. That the time spent by the drivers at the plant during unloading was not work actually performed on the farm (R. 80-81) ;

5. That independent growers cultivated *about* as much acreage and grew about as much cane for processing at Olaa's plant as Olaa did, and that the Company's truck drivers spent *about* one half their time hauling the cane of independent growers, and that therefore *about* one half of the Company's trucking operation was an independent trucking operation conducted for the benefit of other employers (R. 81) ;

6. That although Olaa considered the transportation section as a part of its harvesting department, the truck dispatcher was located at the plant and supervised the work of the drivers from the plant, and that this indicated that the Company's trucking operation was carried on as an incident to or in conjunction with its plant operations, rather than its farming operations (R. 81);

7. The Board purported to distinguish the instant case from the decision of the Supreme Court in the *Waialua* case on the following grounds:

(a) That the Supreme Court stressed the dual function of the railroad employees in that they not only hauled cane from the fields to the mill, but that they also transported farm laborers and farm equipment to the fields on the railway extending throughout the plantation, and that the railway was used exclusively to effectuate the agricultural function of transportation of exempt agricultural workers to the fields, together with their equipment and supplies, and the dual function of hauling freshly cut cane to the mill, while in the instant case the truck drivers only hauled cane from the fields to the plant and have no connection with the cultivation of cane (R. 82);

(b) That the Supreme Court in the *Waialua* case expressly rested its decision on the fact that Waialua's transportation system was either in or contiguous to its fields, save the necessary trackage to the mill to accommodate cane cars arriving from the various sections of the plantation, and that in the instant case no part of Olaa's transportation system is in the fields

since the Board refused to consider the use of Olaa's private roads which were used by the drivers for the sole purpose of hauling the cane from the roadside of the fields to the plant as work performed on the farm, the general practice being then to drive the trucks over the public highways to the plant, and the drivers spent 60 percent or more of their driving time on the public roads; that although all of these private roads appeared to be contiguous to the fields, a considerable part of the public highways used were not contiguous to the fields, and that a long public highway not contiguous to any of the fields *must be used* to haul cane from Olaa's southern fields to the plant which was located in the geographically separated northern fields; that 60 percent or more of the *Company's transportation system* is on the public roads, while Waialua's entire system was on its own private railroad (R. 83);

8. That Wailua transported only its own-grown cane to its mill, while in the instant case the independent growers cultivated *about* as much acreage and grew *about* as much cane for milling by Olaa as Olaa did, and that Olaa's truck drivers spent about one half their time in hauling the cane of the growers (R. 83-84);

9. That in the *Bowie* case the Court held that the agricultural exemption under the FLSA did not apply to transportation employees who hauled cane grown by independent planters, and that in the *Calaf* case the Court held that the agricultural exemption was inapplicable to transportation employees hauling cane grown by their own employer, because the facts in that case showed that the transportation was, in the Court's

opinion, incident to milling rather than to farming; that the Supreme Court in the Waialua case recognized that both the above cases were distinguishable from the Waialua situation, and the Board stated:

> "We conclude therefore that the agricultural exemption under the FLSA does not apply to transportation employees who, as here, haul both cane grown by the employer and cane grown by independent growers,"

and that therefore Banez was not an agricultural laborer (R. 84-85).

III

SPECIFICATION OF ERRORS

The Board committed error in finding,

1. That the central point of all trucking operations was at the mill, and that the work performed by the truck dispatcher was incidental to and hence a part of the mill operation;

2. That Banez, while driving his truck in and out of the fields and waiting for his truck to be loaded, was not performing any actual work on the farm;

3. That the fact that a part or even the greater part of the time spent by Banez after leaving the fields was spent on the public highways rather than on the Company roads, showed that while so driving Banez was engaged in work incidental to milling and not to agriculture;

4. That the time spent by Banez in driving along the roads in the field to pick up the bundles of cane at the

roadside, and in driving out of the fields with his load of cane, was "work performed on the farm" since the general practice was for him then to drive his truck over the public highway;

5. That the fact that some of Olaa's cane fields were not contiguous to each other, and the length of the haul, meant that Banez, because of this, was not, while driving, an agricultural laborer; and

6. That the Board's decision in the instant case is contrary to its earlier decisions on the matter of transportation from field to plant.

IV

DISCUSSION OF FACTS FOUND BY THE EXAMINER AND THE BOARD

1. *The truck dispatcher.*

The Examiner stated that witness Mair had testified that the "central point of all trucking operations was at the mill" from which the trucks were dispatched and their operations *controlled* by the dispatcher who directed their operations by means of a radio phone" (R. 32).

The Board stated that the dispatcher was located at the plant, and that he supervised the work of the drivers from the plant (R. 81). Witness Mair did not so state.

The mill consisted of only one building. There were no buildings appurtenant to it, except one very small building used as a welding shop (R. 141). The truck dispatcher's building was situated in the mill yard, but

it was not a part of the mill (R. 166). Olaa had a two-way radio-telephone system. Witness Mair did state that the trucks were controlled by the truck dispatcher who made out a weekly schedule of the sections or fields the drivers were to go to during the week; that when the drivers left the dispatcher's shack they were given directions as to what routes they should follow in reaching the fields. The plantation placed arrows and markers by the government roads leading into the field roads, and these showed precisely what roads were to be used in going into and out of the fields, and from the fields to the mill (R. 160-161, 163). Obviously, these arrows and markers are placed by the harvesting department, not by the dispatcher. The dispatcher simply tells a driver "go to section so-and-so and follow the arrows" (R. 161).

Witness Mair was asked, "What control do you have over your truck movements; is there any system of recording where the trucks are, when they arrive at what places and so forth?" and he answered, "Yes there is. We do it by radio-telephone" (R. 165). He explained this operation as follows: When the truck reached the field, the loading foreman, who had a radio-telephone in the cab of the crane, reported the arrival of the truck in the field, and if there was no truck ahead of it, he would report the time the truck arrived and when it commenced loading. If there was a delay he would report the time when loading began. Then when the truck was ready to leave the field he would report this. The dispatcher would note all these times in his log (R. 166-167).

It would seem to be necessary on any plantation that wanted to conduct its harvesting efficiently, and to avoid duplication and delay, to have someone do the above described work, and the logical place for a truck dispatcher would seem to be near the mill since it is important, not only that the trucks leave on a regular schedule, but also that their arrival in the mill yard be noted so that the mill may have the cane available as it is required.

The transportation system was, as stated by the Board, considered by Olaa as being a part of its harvesting department (R. 81), and the dispatcher was under the supervision and control of Mr. Mair as head of that department (R. 155). The Board obviously was endeavoring to bring the dispatcher within the decision in the *Calaf* case (127 F. 2d 934), a case in which the Central ground both its own cane and that of the colonos. We shall discuss that case later. We would state here that there is no suggestion that the drivers or the dispatcher were on the payroll sheets.

The routes to be taken by the drivers after they left the main plantation or public roads into the fields were controlled by the arrows and markers, which were not placed by the dispatcher, and their driving in the fields was subject to the control of a loading foreman who sat in the cab of the loading crane which moved along just off the field roads, picking up the bundles of cane (about 1¼ tons each) collected by the harvesting crew, and loaded them onto the truck which accompanied the crane, but which moved along the road. The trucks

would take between 16 and 18 of these bundles (R. 156-157).

We submit that there is nothing in the evidence that warranted the Board's deciding that because the truck dispatcher's shack was located in the mill yard, and because he supervised the truck drivers to the extent above shown, this "... indicates that the Company's trucking operation is carried on as an incident to or in conjunction with its plant operations, rather than its farming operations."

2. *The "work" performed by Banez.*

The Examiner and the Board decided that the time spent by the truck drivers in the Company's fields was not work or labor since, according to the Board, although they spent about 38 percent of their time at the roadside during the loading of the trucks, they "normally just stand around while others do the loading, and do nothing more after the truck is loaded than to slash off the ends of cane sticks which might be protruding from the truck..." and therefore performed no *actual* work on the farm itself (R. 80).

In addition to driving in and out of the fields, the drivers follow the traveling crane along the field roads in order that the bundles of cane, weighing about 1¼ tons (R. 156) can be loaded on the truck, which carries from 16 to 18 of these bundles (R. 157), an item the Board ignored in its decision.

Irrespective of the amount of actual manual labor (as the Board terms it) involved, Banez could not leave his truck and go off on "a frolic of his own." He was

an hourly-paid employee (R. 36), and was paid, as he had to be, for his time spent in the field, as well as that spent during unloading.

Incidentally, we might add that the Examiner noted that during one month of each year the truck drivers worked on trucks at the Company's garage (R. 34). The Board did not mention this.

We shall discuss Banez's duties under "Law".

3. *Use of public and private roads.*

We submit that the fact that Banez spent a considerable part of his time in hauling Olaa's cane over the public roads, or that he may have spent 60 percent of his time in such driving, is wholly immaterial to the determination of Banez's status, and that the length of haul is equally immaterial, but since the Examiner, the Board and the Board's counsel have attributed so much importance to this point as a determining factor we are discussing it here.

The Examiner stated in his report: "I take it, that the ratio prevailing between the two types of land would be reflected in the work of the drivers. On that basis they spend *very nearly* as much time hauling independent grower-raised cane as they do hauling Company-raised cane" (R. 53).

The Board, which stated that it concurred in the Examiner's findings of fact said: "... The Company's truck drivers spend *about* one-half of their time hauling the cane of independent growers. Therefore, *about* one-half of the Company's trucking operation is con-

ducted for the benefit of other employers" (R. 81). Olaa cultivated 7418 acres. The growers cultivated 6911 acres, or 507 acres less, a factor which is important in connection with the Board's earlier decisions which will be referred to under "Law".

The brief for the Board refers to only one map—Exhibit 2-A—which counsel says will be presented to the Court during the argument (Br. 3). This map was a general and undetailed map, introduced to show the terrain of Olaa's lands, and to show the cane lands (R. 130-131). It purports to show only the public roads and the roadbed of the former railroad. No other private road was shown on it (R. 138-139). The printed record mentions "Exhibit 3" which shows the plantation roads (R. 138). The printed record contains a large number of figures in parentheses which, on checking, we find refer to the reporter's transcript. For example, from pages 136 to 175 there are at least 25 such references, and on page 146 the reference is "(see pages 302-306)" and on page 155 it reads "(see page 307)." At the bottom of page 131 of the printed record there is a reference to page 69 of the reporter's transcript, and that page shows that a series of four maps, fastened together, was introduced and marked 3-A, 3-B, 3-C and 3-D; that A shows the Olaa-Mountain View area (enclosed in light green on Map 2-A), which constitutes the major portion of the fields (Tr. 70-71); that B covers the land called Pahoa; that C covers the land called Kapoho, and that D covers the lands called Kamaili, Kaueleau, Kauaea, Malama, Pohoiki and Kapoho. These names are designated on 2-A. This "3"

series shows not only the plantation roads, but also the areas shaded in red, the lands of the independent planters. These maps are important and since counsel for the Board intend to produce Map 2-A at the hearing, we are forwarding the "3" series to the Court. The only difference between the forwarded and the original in evidence is that the copying machine, not being equipped to color the planters' areas in red, shows them in blue.

The witness Burns testified that Map 3-A shows both the public and the plantation roads, and that "the maze of lines in here are almost all of them plantation roadways" (R. 138-139).

We do not agree that an examination of the maps discloses that the public roads are the primary means of transportation between the various sections of Olaa's lands and the mill, or, as the Board puts it, that "the general practice is . . . to drive the tractor over the public highways to the plant" (R. 80). It is possible that in going from the mill to the fields the drivers use the public roads more than they do the plantation roads, but we do not concede that the Board was justified in finding from the evidence that the public highway system was used to a greater extent than the private roads in hauling Olaa's cane from its fields to its mill. Map 3-A, the Olaa-Mountain View area, shows the plantation's cane fields, marked "Field G" etc. The witness Mair testified that in harvesting the cane from Fields L, K, E, F, I, G, H, C, C-2 and C-3, they did not use any public roads, and that in harvesting Fields Q, P, O, D and J-2, they used the public roads "possibly 10

percent of the mileage" (R. 164-165). The record has Field T. This should be Field P. Map 3-A shows that Field T is quite some distance from the other fields named. The reporter may well have been misled by the similarity of the sound of the two letters.

The areas of these fields are not stated, but the map shows a scale of 1 inch=2000 feet. While Manager Burns stated that *in general* Olaa's fields averaged more than 60 acres per field (R. 150), as the maps show, these fields vary considerably in size. The Pahoa and Kapoho maps are on a scale of 1 inch=1000 feet, and Map D of the Kamaili etc. areas is on a scale of 1 inch=800 feet. Using the scale on the Olaa-Mountain View map, A-3, the total area of these 15 fields is well over 2000 acres, with Fields Q, P, O, D and J-2 comprising not quite one half of the total area. Deducting roughly 10 percent from this last area, and making allowance for the small parcels of planters' lands in that area, leaves at least 1900 acres out of Olaa's total of 7400 acres of its own cane land in or for which the public roads are not used at all.

With regard to the use of the old railroad roadbed, Manager Burns testified that "a large part of the roadbed that was formerly railroad-bed is now used as roads for trucking of cane" (R. 131), and the witness Mair, on being asked by counsel for the Board, "Is it correct to say that the senior cane truck driver all or substantially all the time, in hauling cane from the field to the mill, would use public roads to a greater or less extent?" replied, ". . . There are many times and many occasions where we don't use public roads at all. A cer-

tain number of our fields... In the Pahoa, Kamaili areas we use the public roads part of the time in all cases . . . And Olaa-Mountain View, many times we don't need them at all." At the left extremity of the Mountain View area, the truck driver might use the Volcano Road "going right into the mill" (R. 181-182).

In the lower portion of the cane areas, Pahoa down to Kamaili, etc., the trucks apparently usually use the public road in going down as far as Pahoa, but when going down below Pahoa Village they use the old railroad bed (R. 163). The record is somewhat confusing since apparently the junction points were not marked as such on the map. The foregoing apparently refers to the Pahoa area. It seems that in going from the Pahoa area to the Kapoho area, and the other lands below Pahoa, the trucks usually used the public roads, but that in returning they used the old roadbed. Witness Mair was asked, "So that you go down on the main highway and back on the old railroad bed, is that correct?" and he answered, "Correct" (R. 164).

Counsel for the Board on cross-examination asked the witness Mair if it was a fair estimate to say that Banez would be hauling planters' cane for about half the working day, as distinguished from Olaa's cane. The witness replied that he would not put it on that basis; that about half of the year there would be many days when "we would be hauling plantation cane exclusively and other days we might be hauling planter cane exclusively." He was then asked, "So that you would put it on the basis of an overall annual average that approximately half the time would be spent in hauling

planters' cane, is about what it amounts to?" and he answered, "Correct" (R. 182-183). Then counsel proceeded to a discussion of the relative time spent in driving over public and plantation roads, suggesting that about 70 percent was spent on the public roads. The witness answered by taking two areas, the Mountain View section and the Pahoa area, as comparable for harvesting and hauling, stating that the times and distances were comparable. The Mountain View area is the upper portion (toward the Volcano) of the Olaa-Mountain View section. The far end of the Mountain View area is about 14 miles from the mill, and the Pahoa area is about the same (R. 180). If the trucks ran only on the public road *going to* the fields, the elapsed time would, for both ways, going and returning, be about the same—one hour and 10 minutes (R. 184). This figure excluded the travel in the fields which would be about 40 minutes, according to the witness (R. 184). Counsel for the Board again attempted to have the witness give a figure of around 72 percent as the time spent on the public roads, but the witness stated that he had always had in mind the figure of 50-50 (R. 185-186). He stated that for 1953, the year in question, the unloading took considerable of the drivers' time due to slow unloading, and that in his answers he may not have given quite enough weight to that fact. He stated that this matter of the time and distance element was "quite new" to him (R. 188). Then counsel for the Board had him eliminate the time spent in the fields and at the mill, and limit his answer only to the time spent in driving over the public road,

and he stated that on that basis the time would probably be increased slightly; and in response to another question he stated that if the loading and unloading time was eliminated, and considering only the actual driving time in the fields and on the roads, he would try to estimate, and he gave the figure of around 60 percent for driving time on the public roads (R. 190). The witness stated that he did not want to be specific (R. 191). Counsel asked him if he wanted time to study the question (R. 190). The printed record at this point shows several omissions from the reporter's transcript. The last two paragraphs on page 190 of the printed record refer to pages 158 and 159 of the reporter's transcript. The omission is important and we are quoting from it.

When counsel asked the witness if he wanted time to study the matter, the Examiner interrupted him and stated that counsel had gone far enough. Counsel replied that this matter was one of "first impression, I think, to some extent," and he added, "I appreciate your patience and your indulgence. . . ." The Examiner replied, "You will appreciate it much greater when you know that I disagree with the entire affair . . . on all this matter. I think you gentlemen are relying on this Clinton Foods case to a great extent." Counsel for the Board replied, "Yes," and the Examiner continued:

> "And I have seen some cases which I think have shown rather lack of reality on the part of the Board, and this is one of them. If you are going to follow this case, I think you are going to follow

precedent which is entirely questionable. . . ." (Tr. 158-159)

The record is not as clear as it might be on the relative use of public and private roads, but assuming for the purpose of this discussion that this matter is at all material, we are calling attention to two factors which the Board did not consider in its decision: (1), for approximately 2000 acres at a minimum of the Olaa section (more than one fourth of Olaa's total cane area), the truck drivers did not use the public roads at all; and (2), in the Mountain View section the drivers returning from the fields drive about two miles over private roads before hitting the public road (R. 165). The travel is faster over the public road than over the private roads, the latter being unpaved (R. 168). A truck would require 25 to 30 minutes to reach a field in the Mountain View section, and about the same time to return, loaded, to the mill, whereas a trip to and from Pahoa would take 50 to 60 minutes each way, the time required for going to and from the areas below Pahoa being greater (R. 168). As the 3-B, 3-C and 3-D maps show, Olaa's cane areas in these lower lands constitute a small portion of its total cane area. It is obvious that considerably more time is spent in hauling Olaa's cane over its own roads than is spent in hauling it over public roads.

The Board also lays much stress on its statement that no part of Olaa's transportation system is in the fields since, as the Board stated, it did not consider the "use of the Company's private roads by the drivers for the sole purpose of transporting the cane from the road-

side of the fields to the plant as work performed on the farm, where the general practice is then to drive the trucks over the public highways to the plant. . . ." and where a considerable portion of the public highways used are not contiguous to the fields. Olaa has 340 miles of *field* roads over which its cane is transported.

Map, Exhibit 3-A, shows the Olaa-Mountain View area, and it will be noted that the public road system from the far end of the Mountain View section down to the mill runs through this section and along the cane fields in the section. Naturally, it cannot be "contiguous" to every field in the area. This would be impossible in any plantation of any size. It runs through the heart of the cane area. The dividing line between the Olaa portion and the Mountain View portion is the dotted line marked "13 Mile Road" on Map 3-A. The cane area is contiguous from below the mill to the upper end of the Mountain View portion. The mill is located in the Olaa portion and is surrounded by the Company's cane fields (R. 149) and the Olaa-Mountain View section constitutes the major portion of the Company's fields (Tr. 70-71).

The only portion of the public road system that does not run through the cane fields is the 14-mile stretch that runs from the Olaa section down through the barren lava flows into and *through* the Kapoho area, and thence again down through the lava flows to and *through* the Kamaili etc. fields near the ocean, as shown on Map 2-A. As already stated, these waste areas are not cultivable in cane, and the plantation fields are as

contiguous as is possible in view of the nature of the land.

The Board was unable to say that the time spent in hauling the planters' cane was as much as that spent in hauling Olaa's cane. It had accepted the Examiner's finding of fact that this ratio was correctly determined by the relative areas of plantation and planters' fields, and consequently it resorted to and based its finding on the purported length of time spent by Banez in driving over the public roads, but even then, it excluded the time spent in driving in and out of the fields and during the loading.

4. *Driving over the field roads.*

We are wholly unable to fathom the Board's reasoning in holding that "the use of the Respondent Company's private roads by the drivers *for the sole purpose* of transporting the cane from the roadside to the plant was not work actually performed on the farm." The Board obviously decided that this was so for the reason alleged by it that "the general practice is then to drive the trucks over the public highways to the plant, and the drivers spend 60 percent or more of their driving time on the public highways." (R. 80)

The fields are on the farm; the roads into and through the fields are on the farm; Banez, while driving on these field roads, was working on the farm; he was working while driving his truck with the traveling crane along the field road to pick up the 16 to 18 bundles of cane along the roadside; and, as we shall later show, he was engaged in work on the farm while

waiting for each load. This was certainly transportation, and the fact that after leaving the fields he would sometimes, or even the greater part of the time, drive to the mill on the public road rather than on a plantation road, and in the Mountain View section usually traveled for about two more miles on Olaa's roads before hitting the public road (R. 165), cannot change the fact that all of Banez's driving before hitting the public road was in agriculture, and under the supervision of the harvesting superintendent and in his department, transportation being a part of the harvesting department (R. 139).

So far as we can ascertain, this is the first time this theory has been advanced by the Board or any other tribunal.

5. *Length of Haul.*

The record shows that a great deal of time at the hearing was devoted to a discussion of the lack of contiguity of portions of the public highway system to the fields, and more to a discussion of the length of the haul. This caused the Examiner to express his opinion of the materiality of both factors, as we have previously shown.

Except for the reference to the three-mile haul in the *Clinton Foods* case, 108 NLRB 85, this haul being apparently over the public roads, we have found no cases where the Court or the Board have considered this a material factor. In *Holtville Alfalfa Mills v. Wyatt*, 230 F. 2d 398, where the Court said that the "transportation of crops so that spoilage can be pre-

vented is usually considered part of harvesting" (p. 403), the fields of the growers were anywhere from one half to 18 miles from the company's plant. The Court made no reference to length of haul and presumably did not consider this material. Cases involving area of production may not be strictly pertinent, but it is to be noted that in such cases the areas have had varying radii, some of them considerably longer than the length of haul at Olaa. In *Walling v. Rocklin,* 132 F. 2d 3, the company's shop and shipping headquarters was in Sioux City, Iowa, while its greenhouses and gardens were partly in and partly out of the city. The Court apparently was not concerned with the length of haul.

This point seems to be, as counsel stated at the hearing, a matter of first impression. As a matter of fact, we cannot see the difference in theory between a haul of three miles over a public road and a longer haul where, in either case, the road does not run through the fields of the processor.

V

LAW

1. *Section 3(f) of the Fair Labor Standards Act.*

This section defines "agriculture" as including farming in all its branches, including, *among other things,* the specific activities mentioned in the section," and any practices . . . performed by a farmer *or* on a farm as an incident to or in conjunction with such farming operations."

The specific activities mentioned are not exclusive. The phrase "among other things" shows that Congress did not purport to limit the definition.

As stated by the Supreme Court, "the exemption was meant to embrace the whole field of agriculture... From the very beginning of the legislative consideration of the Act, a comprehensive exemption of agricultural labor was a primary consideration of the Congress."

Section 3(f) was, "perhaps, the most comprehensive definition of agriculture which has been included in any legislative proposal" (*Maneja v. Waialua Agric. Co.*, 329 U.S. 254; 99 L. Ed. 1040, 1050-1051).

During the passage of the Bill through Congress, one suggested definition was, "and any practice *ordinarily* performed by a farmer as an incident to any farming operation." The word "ordinarily" was omitted in the final draft.

With regard to the cases cited by counsel for the Board on page 26 of their brief as to the strict or narrow construction of exemptions, the dictionary definitions of the words "exemption" and "exception" make one wonder why so many of the courts have used "exemption" instead "exception", or why so much emphasis has been attributed to the word "exemption" (see *Waialua Agric. Co. v. Maneja*, 216 F. 2d 466, 470-471). However, in construing the exemption, due regard must be accorded to the plain language of the Act, and the intent of Congress. The Act was drawn to accomplish two results: (1) To benefit labor, and (2),

to make specific beneficial exemption provisions for a certain class of employers described in the Act; and its "remedial" provisions apply to activities excepted by the statute to the same degree and in as full measure as those which, in their nature, were intended to be brought in their entirety within the orbit of the statute if the evidence shows that the claim of exemption is supported by adequate proof (*McComb v. Hunt Foods*, 167 F. 2d 905).

For the purposes of this case, we do not contend that Olaa's employees, when hauling to its mill the cane of independent growers, are engaged in agriculture. We do submit that when the truck drivers are hauling Olaa's own-grown cane from its own fields to its mill they are employed in agriculture.

The Board stated in its decision:

> "We conclude . . . that the agricultural exemption under the Fair Labor Standards Act does not apply to transportation employees who, as here, haul both cane grown by their employer and cane grown by independent growers." (R. 84-85)

apparently basing this statement on the three cases cited by it (R. 84).

2. *Banez was exempt as an agricultural laborer.*

(a) *Transportation as "incidental" to harvesting.*

Sec. 3(f) does, as stated by counsel, provide that "delivery to storage or market" is an activity performed by a farmer or on a farm as "an incident to or in conjunction with *such* farming operations," but we do not follow what we gather to be counsel's reasoning

that the transportation of the owner's cane from his fields to his mill is not an activity incident to or in conjunction with harvesting where the farmer transports his own cane to his own mill; nor do we agree that the cases cited on page 27 lay down any such a proposition. The second portion of Sec. 3(f) applies to all the farming operations. The cane cannot be transported until it is harvested. Transportation follows the harvesting, but to say that it follows from this that the hauling is incident to or in conjunction with harvesting only, seems a very strained interpretation of both the language and the intent of the section. Counsel's reasoning seems to be based on the familiar fallacy of "*post hoc propter hoc.*"

Because tillage of the land follows its clearing, and irrigation precedes and sometimes accompanies cultivating, and cutting the cane follows its cultivation, one is not an incident of the other. All are a part of the agricultural process.

The cases cited by counsel as holding either that the transportation of crops from field to mill is not exempt at all, or that if, to be exempt, it must meet the second branch of the exemption, i.e., exempt if performed by a farmer or on a farm (Br. 27), are no authority for the statement that the courts do not regard delivery to storage or market as harvesting, but as activities incident to or in conjunction with harvesting only.

In *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, the Court said that "the question is whether the activity in any particular case is carried

on *as a part of the agricultural function*, or is separately organized as an independent production activity," and "there is the additional requirement that the practice must be incidental to *such* farming."

In speaking of the second branch of the definition, the Court said:

> "Agriculture is defined to include things other than farming as so illustrated. It includes any practices, whether or not themselves farming practices, which are performed either by a farmer or on a farm, incidental to or in conjunction with 'such' farming operations."

The court stated that the company's employees (whose duties stopped at the boundary between the company's water system and the lands of the farmers) were not engaged in farming since the company owned no land and raised no crops, and the second branch of the definition is limited—"Such practices are exempt only if they are performed by a farmer or on a farm." (p. 766)

In *Chapman v. Durkin*, 214 F. 2d 360, Chapman was a "bird dog" operator who bought fruit unfit for packing and sale in its original condition and sold it to canning factories. He owned no farm and grew no fruit. Clearly his activities in hauling the fruit from the groves to his place of business were no part of agriculture; he was not even a processor. The language of the Court was applied to the specific facts in the case.

In this connection see *Chester C. Fosgate & Co. v. U.S.*, 125 F. 2d 775, and explanation of the decision of that case in *Lake Region Packing Assn. v. U.S.*, 146 F.

2d 157, 159, Note 3, and *N.L.R.B. v. John W. Campbell, Inc.*, 169 F. 2d 184. The distinction between these cases and *Chapman v. Durkin*, supra, is recognized by the Court in the *Chapman* case.

We do not find any statements by the Courts in the other cases cited on page 29 that indicate that those Courts so limited "transportation".

The Court in the *Bowie* case, 117 F. 2d 11, at 18, said:

> "The processing of the colonos' sugar cane is incident to or in conjunction with milling operations of the appellants and has no connection with their farming activities."

In the *Calaf* case, 127 F. 2d 934, 936, the Court said:

> "The issue, therefore, is not whether the same owners manage and control the mill, the farms and the transportation system, but rather whether transportation is incident to farming or incident to milling. . . ."

Moreover, Sec. 3(f) uses the phrase "in conjunction with." The word "conjunction" as ordinarily understood means the state of being conjoined, united, or associated.

Hume v. U.S., 118 P. 689, 695;
Highland v. Empire Nat. Bank of Clarksburg, 172 SE 544, 549.

In *Holtville Alfalfa Mills v. Wyatt*, 230 F. 2d 398, 402, the Court said that the trial court "should explicitly find as a fact whether the transportation from the field was or was not *part* of the harvesting activity

or an activity closely enough connected therewith to warrant that the truck driver was employed in agriculture, or, on the other hand, that the alfalfa chopped as a *part* of the harvesting was sufficiently changed in character by the time it reached the truck so that it was no longer an 'agricultural' commodity in its 'raw or natural state'," and the Court added:

> "... When the truck is fully loaded it proceeds to defendant's premises, its place being taken by another truck.
>
> "There cannot be much doubt but that the entire process is harvesting.... There can be no distinction between a harvesting operation and an activity incident thereto, since Congress ... included both in the broad definition of 'agriculture'. The failure of the trial court to specify under which branch of the definition the harvesting activities here fall is without importance. The briefs which attempt to make a point of this failure emphasize a distinction without a difference.

(b) *Transportation by Olaa of its own cane was work performed by a farmer or on a farm, although a part of the haul was over public highways.*

The *Chapman* case, 214 F. 2d 360, 363, cited by counsel (Br. 28) is not at all in point. Durkin was in no sense a farmer, nor a producer. Except for the fact that his employees picked some of the fruit he bought, the Court found his operations similar to those of a broker. The Court correctly held that his employees who hauled the purchased fruit from the fields of the growers to Chapman's plant were not engaged in agriculture.

The *Farmers' Reservoir* case, *supra*, is to the same effect. We shall discuss the *Waialua* case later on, but we would state here that counsel's statement (Br. 28) that "Except in the case of a large plantation embracing both farm lands and a mill . . . transportation of a farm product to a mill normally embraces travel on the public highways" is not entirely correct. The last portion is correct, the first portion is not. Except perhaps for Waialua (so far as the record in that case shows), there is probably not a sugar plantation in Hawaii that does not do a part of its hauling over public roads. Olaa is not unique in this respect. As the Court said in the *Waialua* case, "Certainly no one would argue that the agricultural exemption did not apply to farm laborers who took the cane to the plant in wheelbarrows," (349 U.S. at 26). They would normally have to use the public roads.

The Wage and Hour Administrator, before the decision in the *Bowie* case, ruled as a matter of contemporaneous construction of Sec. 3(f) that, "If a company has sugar cane fields and also a mill, the transportation of its own sugar cane to the mill seems an incidental practice which is included [within the exemption]." (See 349 U.S. at 263, Footnote 4; 99 L. Ed. at 1052). The Administrator made no reference to length of haul, nor to the matter of transportation over public highways versus company roads, and the Supreme Court stated that he had not changed his ruling up to May, 1955, so far as concerned the transportation of the farmer's own cane (*Maneja v. Waialua*, 349 U.S. at 262).

The law is too well settled that the size of a farm, ranch or plantation is immaterial to the application of Sec. 3(f) to require citation of authorities (see *Addision v. Holly Hill Fruit Products*, 322 U.S. 607; 88 L. Ed. 1007 at 1011).

Apparently counsel's position is that no matter how much of the public roads pass through the heart of the Company's fields, as they do in the Olaa-Mountain View Section, from the upper end of the section to the mill, which is situated in that section, and as they do through all the lower areas from Pahoa down, the fact that the public road is used prevents Banez from being an agricultural worker, although, as we have shown earlier herein, all the transportation system was a part of the harvesting department, under the control of the harvesting superintendent, a part of whose duties was to finally approve of the job description of Banez's position as senior truck driver (R. 155); that the duty of the truck dispatcher was only to tell Banez to what fields he should go, and what route he should follow in reaching the sections, where Banez would then follow the direction signs placed by the harvesting department, the dispatcher also keeping a record of the arrival of the trucks in the fields and their departure therefrom.

While we do not agree that Banez spent approximately 60 percent of his time in driving over public roads, and only 40 percent over private roads, the ratio is immaterial, and so is the distance. We have been unable to find any decision or ruling that where even a major part of the transportation of the owner's cane

to his mill is over a public road, this precludes his drivers from being agricultural employees. As counsel for the Board stated during the trial, this, and the distance factor, was rather a case of first impression. (Tr. 158-159). Of course, if Olaa were not a farmer when growing and transporting its own cane, a different situation would be presented.

In the *Clinton Foods* case, 108 NLRB 85, the groves were two to three miles from the plant. It does not appear whether the road or roads used was or were public.

In *Holtville Alfalfa Mills v. Wyatt*, 230 F. 2d 398, the company bought alfalfa from farmers within a radius of from 1½ to 18 miles from its plant. It seems from the opinion that if the chopping of the alfalfa did not change it from its raw or natural state, the Court would have ruled that the drivers who hauled the alfalfa from the fields of the growers to the company's plant were agricultural employees, the Court also stating that:

> "Transportation of crops so that spoilage can be prevented is usually considered part of harvesting."

The hauling in that case was not done on a farm (p. 4032).

In *Vives v. Serralles*, 145 F. 2d 552, the distance of the hauls directly from fields to mill, and the relative use of public and private roads, were not discussed in holding the group 2 employees exempt.

In *Lee Wilson & Co. v. U.S.*, 171 F. 2d 503, where the company had a 50,000-acre farm and five alfalfa mills, and where the transportation from field to mill was held to be agricultural labor, the issues of distance or use of public roads were not discussed. The Court, however, noted that the mill in question was located on the company's own land.

While decisions under other sections of the Act, such as, for example, the "industry" exemptions, are not strictly relevant to decisions under Sec. 3(f), the opinion of the Court in *Oquendo v. Fernando Alvarez & Co.*, 2 W.H. Cas. 600 (U.S.D.C., Puerto Rico), is of some interest. There the plaintiffs were employed by the defendant in processing tobacco bought by defendant and by it hauled to its warehouse where it was graded, fermented and stored, and then transferred to its factory where the plaintiffs worked on it in order to prepare it for market. The defendants claimed their exemption was based on Sec. 13(a)(10). The Court said:

> "An establishment may include several buildings and the buildings need not be located on adjacent lots. In fact, there may be a considerable distance from one building to another. If, in the instant case, we assume that the warehouse at Guayanabo is some 40 or 50 miles from Bega Baja (where plaintiff worked), the two places may still constitute a single establishment if it appears that it is necessary to do part of the work for preparing for market at one place, and complete it at another."

Due, we believe, to the novelty of counsel's contention, we have been unable to find any other decisions that might seem pertinent, and apparently, in view of the cases cited by counsel on p. 28 of their brief, they may have experienced the same difficulty, but as the Court stated in the *Waialua* case, if Waialua had not owned its own mill, its transportation activities from field to mill would come within the agriculture exemptions covering delivery to storage etc., and, as the Court also stated, Congress did not intend to deprive farmers who have their own mills of the exemptions which it affords to farmers who do not (349 U.S. at 261), and in discussing this point the Court was obviously not interested in whether the transportation by wheelbarrow or otherwise was over public or private roads, nor was it interested in the distance of such transportation.

By parity of reasoning, the same is true of Olaa. The Company's fields are as contiguous to each other as it is possible to have them. The greater portion of its area—the Olaa-Mountain View section—is on one tract, in which the mill is situated. The lower areas are separated by areas covered by lava. In this connection it is interesting to note that an eruption about two years ago has destroyed or rendered inaccessible about one third of the land of Kapoho, and the Company has also been compelled to abandon all of Kamaili and Kaueleau (Map 2).

There can be no valid reason why Olaa which, because of the nature of its lands, cannot have all its fields in one compact area, should be penalized, in com-

parison with a plantation more fortunately situated, nor do the authorities require such a discrimination.

(c) *The transportation by Olaa of its own cane to its own mill was an agricultural operation, not incidental to milling.*

The authorities cited by counsel to sustain their contention that "Olaa is not a farmer in handling cane grown by independents, and even the transportation of Olaa-grown cane was incidental to its milling rather than its farming operations," do not sustain the last part of this contention, nor do the facts warrant any such a statement.

We do not contend that the mill employees were employed in agriculture. The Supreme Court in the *Waialua* case stated:

> "From a consideration of all the relevant factors, the question would be an extremely close one in gauging whether this milling operation is farming or manufacturing."

It seems that the majority of the Court were influenced to a considerable extent by what they found to be the ratio between the number of plantations in Hawaii and the number of independent growers whose cane they processed. It is possible that the fact that Waialua would not be hurt by this ruling since it was already paying the mill employees more than the required minimum wage, and that the 7(c) exemption also gave it almost complete relief from overtime, also influenced the majority (349 U.S. at 274). Three Justices felt that the mill employees were engaged in

agriculture, but we must, at least for the present, accept the decision of the majority as the present law in the Hawaii Sugar Industry, and Olaa's mill employees are not exempt no matter whether they process plantation cane alone, or also process that of the growers under their existing agreements.

It is to be noted that counsel do not, as they cannot, state that Olaa processes a greater amount or even an equal amount of the cane of the planters, as compared to its own cane, nor that the truck drivers spend more time in hauling planters' cane than they do in hauling Olaa's cane. We shall take up this point under a consideration of the Board's other decisions.

The cases cited by counsel (Br. 29-30).

In *Bowie v. Gonzalez*, 117 F. 2d 11, the district judge, according to the First Circuit Court of Appeals, had held that the farmers engaged in transporting their own cane were exempt because they were engaged in an agricultural operation, and that those engaged in transporting the cane of the independent farmers were not exempt. The employees had not appealed and the appellate court stated that when the case was sent back to the District Judge for modification of his rulings he was correct in excluding those employees who hauled the central's cane.

In *Calaf v. Gonzalez*, 127 F. 2d 934 (Br. 27), where the central ground both the plantation cane and that of independents, the Court said that the precise problem before it was not decided in the *Bowie* case, i.e., whether the employees who carried cane exclusively

from their employer's farm to its mill, were covered by the Act. The Court noted that the same cars that hauled the central's cane, and the same employees who operated and maintained the cars, were involved in the hauling of cane and the maintenance and operation of cars which hauled the cane of the independents, and that while it was possible to show the segregation of the cane of the independents, none was offered to show a segregation of the cane grown by the defendants individually on their own farms, as distinguished from the farms owned by them jointly, but the Court said:

> "We place our decision, however, on the broader ground that the transportation of sugar is *incident to milling rather than to farming*, and therefore is not exempt under the Act."

and the Court added:

> "The mere fact that in this case the owners of the farm are also the owners of the mill and the transportation facilities does not make transportation *incident to farming*. The issue, therefore, is not whether the owners manage and control the mill, the farm and the transportation system, but whether transportation is incident to *farming*, or incident to milling. . . ."

The Court went on to bolster this ruling by stating that the workers were all employed by the central, their names were found on the payroll sheets of the central, the locomotives and cars had their depot at the mill, and moved from the mill to the farms and back, and the transportation employees did no agricultural work. The Court hedged by stating that "if the evidence dis-

closed that the heart of the transportation system and the situs of the employment of the workers were located at the farm," the Court would be presented with a far different situation; but the Court then added:

> "There seems no rational basis for saying that simply because the ownership of the mill and the farms is in the same hands, that therefore those employees who are engaged in an activity which is *separate and distinct from agriculture* are exempt from the provisions of the Act."

In other words, the Court went back to its earlier statement that "transportation is incident to milling in all cases."

Counsel for the Board in his line of questioning of the witnesses attempted to bring the Olaa situation on to all fours with the *Calaf* case.

With regard to the *Calaf* case, the author of the annotation, following the opinion in the *Waialua* case (99 L. Ed.), states at p. 1067 that:

> "The broad view that transportation of sugar cane from an employer's farms to the employer's mills is not covered by the agricultural exemption, was taken in Calaf v. Gonzalez . . . This view is inconsistent with the holding of the United States Supreme Court in Maneja v. Waialua Agricultural Co."

The *Calaf* case arose to plague the Court in the later case of *Vives v. Serralles*, 145 F. 2d 552. We must confess to some difficulty in analyzing the decision, especially in view of the syllabus. The employees were divided into two groups. The syllabus (parag. 2) ap-

parently relates only to the first group. The second group hauled cane from the fields to the mill, some operating tractors and others driving oxcarts. The witness, Villafrance, a tractor hauler, certified that he and his fellow operators, and also the oxcart drivers, "worked in the transportation of sugar cane." The Court held that these employees in group two were exempt, purporting to distinguish the *Calaf* case where the drivers were paid by the mill, while those in both groups in the *Serralles* case were employed and paid by the field department; that the area of activity to which coverage was extended in the *Calaf* case began at the mill and ended at the concentration point, while the situs of the activities in which the employees in the instant case were engaged was the field. The Court stated that if it were to rest its decision on the rationale of the *Calaf* case, it would hold the concentration point as the line of demarcation between transportation as an incident to milling, and transportation as an incident to farming, but that the *Serralles* case was controlled by Secs. 13(a), (6) and 3(f) of the Act, and the Court stated that the plaintiffs were agricultural workers. It rather seems to us that in the case of the employees in group two, the Court found that the concentration point was at the mill.

It is to be noted that the Court (p. 555) found it necessary to reconcile the Fair Labor Standards Act with the 1937 Sugar Act passed by Congress for the Sugar Industry of Puerto Rico.

In so far as any of the Puerto Rico cases may be said to hold that the transportation by a farmer of his

own cane to his own mill or the mill of another for grinding is not agriculture, those cases are not the law today.

Counsel purport to assimilate the facts in the present case with the Court's findings of fact in the *Calaf* case.

There is no evidence that the headquarters of the transportation system was at the mill. True, the truck dispatcher had his shack in the mill yard where he kept a record of the departure of the truck drivers for loads, told the drivers what roads to take to reach the fields, at which points they took the roads indicated by arrows or other signs presumably placed by the harvesting department, and he kept a record of the time they arrived at the loading places in the fields and the time they left to return to the mill. The dispatcher was not a mill employee. The mill employees were limited to the 170 employed at the mill itself in the factory or milling operations and the service operations associated with the running of the mill, called by counsel for the Board at the hearing, and by Manager Burns, as "maintenance employees" (R. 142-143). The entire mill operation was under the factory superintendent. The transportation section was under the harvesting department, which in turn was under the field superintendent (R. 139). The truck dispatcher was under Mr. Mair, the head of the harvesting department (R. 155). While he made out, in the first instance, the specifications or job description of the duties of Banez as a senior truck driver, these were subject to the approval of Mr. Mair as head of the department (R. 155), and Banez was under his jurisdiction (R. 160). When

a vacancy occurred in the job of a senior truck driver the dispatcher, who was the immediate supervisor under Mair, notified Mr. Mair, who also was required to approve of the application form for additional personnel for the cane transportation trucks (R. 169). During the harvesting season, since cane will spoil if not speedily milled, the transportation of the cane is an "around the clock" operation (R. 160). Any large agricultural operation, whether a sugar plantation or a fruit or other farm, that has to haul its produce from the field to the processing plant, must, to prevent confusion and waste of time, keep some control over and record of the operations of its transportation trucks. Olaa had approximately 33 of these trucks going to different fields. The mill had to be kept grinding during the harvesting season, and if no coordination were exercised over the movements of the trucks, both field and mill operations would be disrupted. This could not take place in the fields. It had to be located at one central point at or near the mill, but it was still a part of the transportation division.

There is nothing in the record to indicate that either the dispatcher or Banez was on the payroll sheets of the mill. They were a part of the field division and the presumption is that, like the witness Villafrance in the *Serralles* case (145, F. 2d at 554), they were on the payroll of the field or harvesting department.

In *North Whittier Heights Citrus Assn. v. NLRB* 109 F. 2d 76, the employees were all working in the packing sheds of a co-operative association which processed the fruit for the members of the association and

others for marketing under a marketing contract with an independent organization, and the fact that the growers are members of such an association does not make the packing or selling by the association, packing or selling by the growers. The Court properly found that the growers who produced and delivered the fruit to the association for processing, etc., were engaged in agricultural labor, but that the work done by the association's employees in the packing sheds was not agricultural labor.

In *Idaho Potato Growers v. NLRB*, 144 F. 2d 295, the Idaho Potato Growers, Inc. was, according to the Footnote, a corporation. There were other corporations, partnerships and individuals involved. All except the Traffic Association were potato dealers. The Idaho Potato Growers was a co-operative enterprise which did not buy the potatoes in which it dealt, but which shipped them for the account of farmers, both members and nonmembers, and for the account of other dealers. A few of the dealers grew a small portion of the potatoes they handled. The Idaho Potato Growers, Inc. did not. After a dealer had agreed with a grower to buy or handle the grower's potatoes, the potatoes had to be sorted according to grade and packed for shipment. This work was done either in the warehouse of the dealer or in the grower's cellar, by one of the crews in the employ of the dealer. The operations of these dealers seem to be pretty much in the nature of brokers, except for the addition of the work of sorting and grading, which was a part of the dealers' operations.

The Court held that the warehouse employees who sorted the potatoes in the cellars of the growers were not agricultural laborers. It found that their status was similar to that of the laborers in the *North Whittier* case above discussed, and to those in *NLRB v. Tovrea Packing Co.*, 111 F. 2d 626.

Irrespective of the correctness of the Court's decisions, the *North Whittier* and *Idaho Potato Growers Association* cases have no application to the production and transportation by Olaa of its own-grown cane.

In *NLRB v. Tovrea Packing Co.*, 111 F. 2d 626, the company was engaged in a general meat packing business, buying, feeding, slaughtering, processing and marketing livestock. It apparently raised no cattle of its own, although it apparently had several ranches on which it grew feed, a portion of which was fed to cattle on the ranches, apparently after they had been purchased. The cattle were moved from the ranches or fields to feeding pens adjacent to the packing plant. The employees involved worked in the feeding pens and feed mill which were adjacent to the packing plant.

The Court found that the cattle were kept in the feeding pens for a short time and fed intensively to fatten them for slaughter. The Court said that labor on a cattle ranch is agricultural, but that the facts did not present a case of stock raising or feeding as an incident to a stock ranch, nor of stock feeding or conditioning as a separate activity, but that the facts showed that the stock, ready for conditioning and fattening, were confined in the pens and fed as an incident

to a meat slaughtering and packing industrial enterprise, and the Court said it could find no effective relationship between the packing plant and its adjacent mill and pens, and the company's ranches.

We do not see what bearing this case has on the instant case.

Counsel's statement that "so far as the record shows, Banez may on occasion transport both Olaa-grown cane and independent-grown cane in the same truckload" is not borne out by the record. The record shows that each field is harvested separately, and that the truck driver moves along the field road until his truck is loaded (R. 155-159). A mixture of the plantation and of the growers' cane in the same truckload would be in violation of Olaa's contracts with the growers, whether under a cane-purchase agreement or a toll agreement. The grower's cane must be weighed separately, as otherwise he would not know whether he is properly recompensed.

The cases cited in the Footnote 17 at the bottom of pages 30-31 of the brief are irrelevant. The Board's jurisdiction is controlled by Sec. 3(f) of the Fair Labor Standards Act, not by the Wage and Hours Law. This case does not involve such specific exemptions as those for handling, slaughtering and dressing livestock, first processing, canning, etc., some of them being "industry exemptions". The fact that under the Wage and Hour Law the Administrator and the Courts hold that if an employee, during any work week, spends a part of his time in exempt work, and a part in non-exempt work, he is entitled to the minimum wage and overtime for

all work performed during that week, is immaterial to the question whether Banez is an agricultural laborer in this case.

(d) *Banez was working while in the fields and at the mill.*

The Board held that the drivers while in the fields normally just stand around while others do the loading, and do nothing more after the truck is loaded than to slash off the ends of cane protruding from the truck, and that consequently they "perform no actual work on the farm itself so as to be even partly engaged in an agricultural function."

While the brief for the Board does not discuss this point, it was an important factor in the Board's decision. Banez was an hourly-paid employee. While in the fields he did not merely stand around doing nothing except to cut off cane ends. He had to do more than this (see Olaa's brief, pp. 17-18). He apparently did stand by in the mill yard while his truck was being unloaded, but he was in charge of his truck at all times. This was all a part of his regular duties for which Olaa had to pay him as his contract wage. He was at all times during the working day subject to and under the control of the Company.

We have not been able to find any decisions under the National Labor Relations Act on this point, but it would naturally arise under the Wage and Hour Law.

Banez was certainly working on Olaa's farm while he was driving his truck from point to point through the fields, and he was on duty and required to take

whatever affirmative action was necessary at any time, or in connection with his duties as a truck driver. Both while in the field and at the mill he was engaged in "work" within the meaning of the Fair Labor Standards Act.

In *Thrasher v. Handler*, 10 W.H. Cas. 103, the Court said:

> "The term 'work' as used in the findings of fact is used in the sense that it is used in the Fair Labor Standards Act. It doesn't mean that the plaintiff was engaged in actual physical labor for the full eight hours a day, but he was on duty during that time, and under his contract of employment was required to do whatever was necessary to keep the lease in operation. . . ."

See

Travis v. Ray, 41 F. Supp. 6;

Walling v. Blue Mountain Logging Co., 6 CCH Lab. Cas. Par. 61, 466;

Walling v. Halliburton Oil Well Co., 4 W.H. Cas. 751;

Walling v. Dunbar Transfer etc. Co., 3 W.H. Cas. 284.

In *Skidmore v. Swift*, 323 U.S. 134, the Court said at page 136:

> "We hold that no principle of law found either in the statute or in court decisions precludes waiting time from also being working time. We have not attempted to, and we cannot, lay down a legal formula to resolve cases so varied in their facts as are the many situations in which employment

involves waiting time. Whether in a concrete case such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court."

See also,

Armour & Co. v. Wantock, 323 U.S. 126; 89 L. Ed. 118;

Bicanic v. J. C. Campbell Co., 5 W. H. Cas. 364;

Walling v. Bank of Waynesboro, 5 W. H. Cas. 467.

In *Steiner v. Mitchell*, 215 F. 2d 171, the Court said that the only question for determination was whether the activities of the employees "... are so closely related to the duties which they are employed to perform as to constitute an integral part thereof and should be classed as 'principal' rather than 'preliminary' and 'postliminary' activities. . . ."

The Fair Labor Standards Act was passed for the same general purpose as the National Labor Relations Act, and we can see no reason why the Labor Board is justified in attempting to apply a different meaning to the terms "work", "worked", or "hours of work", than the courts use in construing the Fair Labor Standards Act.

3. *The burden of proof and the finality of the findings of the Labor Board's decision.*

In a proceeding to enforce an order of the Board when the Board appears before a statutory Court, it appears as a mere litigant and must establish its right to the relief for which it prays, and it is within the Court's province to determine whether the findings of

the Board are supported by evidence, and whether the order is appropriate under the statute.

NLRB v. Ford Motor Co., 119 F. 2d 326.

The findings of the Board with respect to questions of fact must be supported by substantial evidence.

29 U.S.C.A., Sec. 160(f);
NLRB v. Haddock Engrs., Ltd., 215 F. 2d 734;
NLRB v. D. Gottlieb & Co., 208 F. 2d 682.

In *Miller & Lux v. Industrial Accident Comm.*, 178 Pac. 960, the Court held that where the ultimate finding of the commission that an injured employee was within the operation of the statute allowing compensation was based on probative facts found by it which failed to establish the ultimate facts found, the Court could annul the finding.

See

Cook v. Massey, 220 Pac. 1088;
Calif. Employment Comm. v. Bowden, 126 P. 2 972.

4. *The Clinton Foods case and the Waialua case.*

The Board held that the *Clinton Foods* case is not applicable, but that the general work of Banez was more like that of the "semi-drivers" in that case, and was not like that of the "flat drivers" who hauled fruit directly from the company's groves to the plant. The Board stated that Olaa's truck drivers were engaged exclusively in hauling sugar cane from the roadside of the Company's fields to its plant, and that therefore their work is more like that of the semi-drivers who, instead of hauling directly from the fields, hauled from the *roadside* to the plant. The Board found that the

semi-drivers were industrial employees "in accord with the desires of the parties." It would seem that the Board considered that the roadside in that case was the concentration point. The Board does not state whether the roadside was company property within its fields, or whether this was a public road system, but it found that the "goat drivers" hauled the fruit from the groves to the roadside in vehicles. In the present case the truck drivers haul from the fields directly to the plant and move along the field roads to pick up the 1½ ton bundles. However, the Board was not sure that Olaa's drivers were not like the flat drivers, and it proceeded to discuss on pages 80-81 of the record, certain factors, including length of drive, and its contention that Olaa's drivers did nothing except stand around during loading and slash off protruding cane sticks, and it purported to bolster its position by arguing that the situs of the truck drivers was at the mill.

The decision in the *Clinton Foods* case uses the following language with respect to the goat flat drivers:

> "These drivers spend approximately two-thirds of their time when working in company-owned groves . . . hauling fruit directly from the groves to the plant in flats."

It seems to us that the words "hauling fruit directly from the groves to the plant" indicate the work which the goat flat drivers did in the fields. There is, so far as we can gather from the decision, no suggestion that they did any cultivating or harvesting. The Board noted that these drivers spent "a substantial part of their time on the farm property, and that the opera-

tion was conducted by and for the benefit of the employer who admittedly is engaged in a farming operation." The Board does note the distance between the groves and the plant as a contributing factor, but as we have already stated, we cannot see why a distance of three miles, if the haul is over public roads, is material. If a truck driver is not engaged in agriculture while driving 12 or 23 miles over a public road, he is not more so engaged when driving three miles over a public road, and apparently a road that did not run through any of Clinton's groves.

It is to be noted that Acting Chairman Rodgers dissented from the Board's decision in the Olaa case on the ground that its decision in the *Clinton Foods* case was controlling (R. 93-95). A dissent by a member of a tribunal from the decision of the majority is a matter that the Appellate Court may take into consideration in determining the correctness of the decision of the majority. (*Wyman-Gordon Co. v. NLRB*, 153 F. 2d 480, 483).

In the *Waialua* case the Court was not ruling that transportation of laborers and equipment to the field, in addition to transporting the cane from the fields to the mill, was a necessary prerequisite to the agricultural exemption. The Court said:

> "We cannot hold that merely because Waialua uses a method ordinarily not associated with agriculture—a railroad—*to transport the cane from the fields to the mill*, it has forfeited its agricultural exemption. Where a farmer thus uses extraordinary methods, we must look to the function

performed. Certainly no one would argue that the agriculture exemption would not apply to farm laborers who took the cane to the plant in wheelbarrows. . . ."

The Court also stated:

"Furthermore, had Waialua not owned the mill, its transportation activities *from field to mill* would come squarely within the agricultural exemption . . . We do not believe the Congress intended to deprive farmers having their own mills of the exemption it offered to farmers who do not."

The Court then continued:

"Similarly, the exemption clearly covers the transportation of farm implements, supplies and field workers to and from the fields. . . ."

In other words, the Court held that not only was the transportation of cane from field to mill an agricultural operation, but also and independently, that the transportation of the implements and field laborers to and from the fields was a necessary part of the agricultural enterprise.

We believe the dissenting opinion of the Acting Chairman of the Board correctly analyzes the *Waialua* case.

It is further to be noted that the Board in the present case refused to consider the use of Olaa's private roads "by the drivers for the sole purpose of transporting the cane from the roadside to the plant as work actually performed on a farm, where the general practice is then to drive the trucks over the public highways to the plant, and the drivers spend 60 percent or more of

their driving time on the public highways." We fail to see the logic of this reasoning.

VI

THE DECISION BY THE BOARD IN THE PRESENT CASE IS IN CONFLICT WITH ITS EARLIER DECISIONS

The Board's decisions in the past in the case of an employee engaged part time in covered operations and part time in noncovered operations have been so much at variance with each other that it is impossible to tell today on what limb the Board will alight in a given case. This is especially true in cases where the Board has passed upon the composition of a proper bargaining unit.

The following cases are illustrative.

In *Eastern Sugar Associates*, 99 NLRB 809 (1952), the Board held that employees who were engaged in repairing trucks and building and repairing carts for hauling sugar cane from the fields to the railroad sidings were agricultural employees, although they did not work on a farm, since the equipment on which they worked was used by the employer solely for farming operations. The Board emphasized the fact that these employees were classed by the employer in its agricultural division, as distinguished from mill operators who were classed by the Company in its operating division.

In *Antle Carrots, Inc.*, 110 NLRB 741 (1954), the employer was engaged in crating and packing carrots grown on lands of independent planters. The Board

found that its packing shed employees were not agricultural laborers, but the duties of one employee were to repair machinery in case of a breakdown in the shed, on the road, or in the field, using a pickup truck to make repairs on the road or in the field. The Board said:

> "The record does not disclose what percentage of the maintenance man's working time is spent in repairing farm machinery in the field."

and continued,

> "The Board has held that field maintenance men, because they repair agricultural machines on farms, are engaged in work incidental to farming operations. More recently, the Board considered whether individuals who divide their working hours between agricultural and nonagricultural duties should be regarded as falling within the statutory exclusion of agricultural labor, and decided that they must be excluded from units of employees covered by the Act. Accordingly, we shall exclude the maintenance mechanic from the union herein found appropriate." (Citing the Clinton Foods case)

In the determination of a unit appropriate for collective bargaining, the Board has held that a unit of all the service stations of the employer was appropriate although some of the units were located 90 miles from the city where the principal office and a great number of stations were located.

Super-Test Oil Co., 97 NLRB No. 116 (unreported).

Also, the Board has held that the employees of a company engaged in woods operations and portable

millwork operations located 40 to 50 miles from a lumber company's sawmill and other operations, and log truck drivers who carry logs from the woods to the sawmill, were properly included in an employer-wide production and maintenance unit in favor of the integration of the operations and common working conditions.

See,

Townsend Sash, Door & Lumber Co., 96 NLRB 950.

In *L. Maxcy, Inc.*, 78 NLRB 525, the Board was unable to determine what percentage of their time the "goat truck" drivers spent in hauling fruit (grown by the company and also by independent growers) from the orchards to the roadside, and what part they spent in hauling directly from the orchards directly to the plant. The evidence was in conflict on this point. The Board said:

> "The Board has held that the functions of goat-truck drivers in hauling fruit from the orchard to the roadside is within the agricultural exemption, and requires that employees thus engaged be excluded from the benefits of the Act. On the other hand, the Board has held that the transportation of agricultural products from farm to processing plant is not covered by the agricultural exemption. . . . Accordingly, all employees dividing their time between agricultural employment and nonagricultural employment are deemed to be within the unit herein found appropriate. . . ."

In *Sampsel Time Control, Inc.*, 80 NLRB 1250 (1948), certain employees washed windows, cleaned walls, and did other types of maintenance work, in addition "to making hourly tours of the plant as part

of their security duties." The Board termed them "janitor-watchmen." The decision does not indicate the nature of their security duties. The Board stated:

> ". . . According to the testimony at the hearing, they divide their time equally between maintenance work and plant security functions. . . . As they do not spend more than 50 percent of their working time as watchmen, they will be regarded as maintenance employees, and will be included in the unit."

In *Steelweld Equipment Company, Inc.*, 76 NLRB 831 (1948), the Board stated:

> "It appears that three maintenance employees at the plant combine with their maintenance duties service as night watchmen. The record is not entirely clear as to what proportion of their time is spent in such service. If they spend *more than* 50 percent of their *working time* as night watchmen, we will consider that they are 'employed as a guard' within the meaning of Section 9(b)(3) of the amended Act, and they will be excluded from the unit; otherwise, they will be regarded as maintenance employees and will be included." (Italics added)

In *United States Gypsum Company*, 81 NLRB 344 (1949), the Board stated:

> "Watchman: The record discloses that the watchman spends equal amounts of time in maintenance and plant-protection functions. As he does not spend *more than* 50 percent of his time as a watchman, we shall include him, as a maintenance employee, in the unit." (Italics added)

In the *Walterboro Manufacturing Corporation* case, 106 NLRB 1383 (1953), the Board stated that:

> "It is the nature of the duties of guards and not the percentage of time which they spend in such duties which is and should be controlling."

However, in *Queen City Furniture Company, Inc.*, 87 NLRB 634 (1949), the Board ruled that two men designated as watchmen by their employer, who operated production machines, fired the boilers and cleaned the plant, and who spent "a few moments out of each hour in making the rounds of the plant as watchmen" should be included in the bargaining unit as production or maintenance employees.

Similarly, in *Indiana Desk Company, Inc.*, 82 NLRB 103 (1949), the Board included in the bargaining unit as maintenance and production employees, watchmen who spent 15 to 20 minutes out of each hour in making rounds about the plant, and who spent the rest of their time in the boiler room keeping the fire going in the boiler.

In *Northern Redwood Lumber Company*, 88 NLRB 272 (1950), the Board held that watchmen who made hourly tours should be excluded from the bargaining unit, but that a janitor who acted as a watchman for one 8-hour shift, the rest of the week being spent in janitorial duties, should not be classed as a guard, the Board stating:

> "As the janitor spends the greater part of his time doing maintenance work, we find that he is not a guard within the meaning of the Act."

See to the same effect, *Carolina Metal Products, Inc.*, 76 NLRB 644 (1948).

In *Wiley Mfg. Inc.*, 92 NLRB 40 (1950), the Board held that two firemen-watchmen who spent about 40 percent of their time as watchmen and the remainder of their time as firemen, and that a third employee who spent *half* his time in each capacity, should be included in the unit of production and maintenance employees. The Board said:

> "As none of these three employees spend(s) *more than* 50 percent of his time as a guard, we shall include them."

In *Hershey Estates*, 112 NLRB 1300 (1955), the Board said:

> "The Board has recently held that employees who divide their time between agricultural and nonagricultural activities, spending a *substantial part of their time* in performing agricultural duties, will be considered 'agricultural laborers' and excluded from units of employees covered by the Act."

The footnote, p. 1302, shows that the Board was referring to the *Clinton Foods* case. So far as we can ascertain from the *Hershey Estates* case, the Board did not attempt to determine the percentage of time spent in agricultural and nonagricultural labor.

We have been unable to find many pertinent decisions directly involving agriculture, aside from those discussed in the *Waialua* decisions in 178 F. 2d 603; 216 F. 2d 466, and 349 U.S. 254, but it seems to us that

the decisions involving such employees as watchmen, guards, etc., cited above, are applicable.

The Board does not mention the case of *Pepeekeo Sugar Co.*, 59 NLRB 1532, decided in 1945. In that case the Board, while holding that many kinds of work are definitely classed as agricultural, said:

> ". . . some of the employees divide their time between agricultural and non-agricultural pursuits. While all of such employees may be represented by the successful union in respect to that part of their employment which is not agricultural, *only those employees* who spend 50 percent or more of their time in such non-agricultural employment have a sufficiently substantial interest in the terms and conditions of employment to entitle them to vote in the election. . . ." (pp. 1544-1545)

This decision was rendered before the passage of the restrictive appropriation acts. It may, however, account for the Board's emphasis on what it considered to be the relative use of the private and public roads in the present case.

The Board states that the part time rule in the *Clinton Foods* case, 108 NLRB 85, also decided by it prior to the controlling appropriation acts, is not applicable (R. 79-80). The Acting Chairman believed it is applicable. He stated that in that case the Board had held that:

> ". . . Employees who divide their time between agricultural and nonagricultural employment, spending a *substantial* part of their time in per-

> forming agricultural duties, will be deemed 'agricultural laborers'." (R. 95) (Italics added)

That this is correct is clear from the Board's statement at the bottom of page 87 and the top of page 88 concerning some of its earlier decisions where less than one-half the employee's time was spent in a noncovered activity.

1 CCH LRR, Sec. 1670.06, cites the *Clinton Foods* case in support of the following statement:

> "Workers who divide their time between agricultural and non-agricultural labor are within the exemption if they spend a substantial part of their time—such as one-third—in agricultural labor."

The exclusion of agricultural workers under the Fair Labor Standards Act is very broad, and the provisions in the Act are to be liberally construed.

> *Waialua Agric. Co. v. Maneja*, 178 F. 2d 603, 608; 216 F. 2d 466, 470.

We can see no reason why the "exemption" should be given one construction in a labor dispute, or in determining the proper unit for collective bargaining, and a different one in connection with the jurisdiction of the Labor Board.

The Board throughout its decision has based its opinion on portions of the evidence only; has in every possible instance construed the implications of the evidence as strongly against Olaa as it could; has placed upon Olaa the burden of proof in all details of the case, and we respectfully submit that its decision is not substan-

tiated by either the evidence or the law, and that a decree enforcing the order of the Board should not issue.

ARTHUR G. SMITH
Attorney for
OLAA SUGAR COMPANY, LIMITED,
Respondent.

SMITH, WILD, BEEBE & CADES
Of Counsel.

PROOF OF SERVICE

I, ARTHUR G. SMITH of SMITH, WILD, BEEBE & CADES, attorneys for Olaa Sugar Company, Limited, do hereby certify that I caused to be mailed, postage thereon fully prepaid, registered, return receipt requested, through the United States Air Mails,

Twenty copies of the foregoing Answering Brief of Olaa Sugar Company, Limited, Respondent-Appellant, to:

Paul P. O'Brien, Esq.,
Clerk, U.S. Court of Appeals, 9th Circuit,
P. O. Box 547,
San Francisco 1, California.

Three copies thereof to:

General Counsel,
National Labor Relations Board,
Washington 25, D.C.

One copy thereof to:

James A. King, Esq.
Bouslog & Symonds,
63 Merchant Street,
Honolulu, Hawaii.

One copy thereof to:

Mr. Favorito P. Banez,
P. O. Box 332,
Olaa, Hawaii.

Said copies were deposited in the Post Office at Honolulu, Hawaii, on the 18 day of December, 1956.

Arthur G. Smith
Bishop Trust Building
Honolulu, Hawaii